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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1012

DAVID HENRY MITCHELL, III,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petition for a Rehearing

Petitioner prays that the United States Supreme Court reconsider its denial of a writ of certiorari dated March 20, 1967 and now grant such writ to review the judgment of conviction.

The Court's attention is respectfully directed to the Petition for a writ of certiorari of January 27, 1967.

Despite the growing protest throughout this country and abroad to United States policy in Vietnam, the United States Supreme Court has chosen, by denying certiorari, to *ignore* the important challenges raised by this petitioner and to allow his five year imprisonment to stand without

his defense having been heard. By avoiding the facts, the American people, and now the Courts, have become accessories to the United States government's violations of international law and its crimes against the people of Vietnam and the world.

Thirty years ago the Nazis proclaimed an anti-Bolshevik crusade and proceeded to implement their plans by aggression and murder. Their crimes were infamous. But most of the world sat by and watched—especially the German people.

Finally the world was forced to react but only after many had shared actively or by their silence the guilt for butchery of peoples, nations and peace. In the end the Germans were defeated and tried at Nuremberg. There it was proclaimed that every individual had the responsibility to see that such crimes did not re-occur and that every individual was obligated to refuse to participate in the crimes of his government. At Nuremberg, following U. S. leadership, a world numb from recent horrors attempted to establish principles of individual responsibility for implementing international prohibitions against aggression and inhumanity.

Today—twenty years later, the United States stands accused of violating these very same principles of international law in Vietnam and other areas of the world.[1]

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[1] The New York Times of May 24, 1966 reported a plea for freedom on behalf of imprisoned Rudolph Hess, who was Hitler's Deputy Führer and a leading Nazi theoretician. Hess was convicted at the Nuremberg Trials for crimes against humanity and for aiding in the preparation and waging of a war of aggression and domination. Hess' lawyer cited America's war against Vietnam as proof that America, the country which was the main advocate of the Nuremberg principles and trials, doesn't hold much stock in abiding by these principles. How sad a commentary on present day morality that one of the few who remembers the principles estab-

(Footnote continued on following page)

The war of aggression being waged by the United States is trampling Vietnam's fundamental national rights: independence, sovereignty, unity, territorial integrity and self-determination. In the course of this aggressive war the United States has been torturing prisoners, using weapons repugnant to civilized man—napalm chemicals and gases, bombing civilians and herding the people of Vietnam into concentration camps called "strategic hamlets".[2]

> Unless words have lost their meaning this country is pursuing an aggressive military intervention in Vietnam. Mr. Justice William O. Douglas of the United States Supreme Court declared in a speech before Middle Tennessee State University on March 8, 1966 that the "United States is violating the United Nations Charter by waging aggressive war in Vietnam." "The Nashville Tennesseean", March 9, 1966. He continued: "... too often, the United States accepts the rule of law only when doing so is to our advantage." "The Nashville Banner" March 9, 1966 (United States v. Oquendo, Eastern District of New York, Defendant's Trial Memorandum, p. 8).

The petitioner has invoked, among others, the Nuremberg laws in justification for his refusal to participate in such war crimes and violations of International Law. He, to-

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lished at Nuremberg is a man who was judged by them and one who should most benefit from their being repudiated. If most of the world proceeds to repudiate the Nuremberg principles by action or indifference, then there is no basis for continuing to condemn the horrors unleashed by the Nazis, and even less for trying and convicting them.

[2] Reverend Dr. Martin Luther King, Jr., in a recent speech likened the use of new American weapons in Vietnam to the German's testing of "new medicine and new tortures in the concentration camps of Europe". He urged Negroes and "all whites of goodwill" to boycott the Vietnam war by becoming conscientious objectors to military service (New York Times, April 11, 1967).

gether with growing numbers of other young Americans have taken literally the words of Mr. Justice Jackson at Nuremberg.

> "If certain acts in violations of treaties are crimes they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (*International Conference on Military Trials,* Department of State Publications N. 3880, p. 330.)

It is supremely ironic that these laws have been repudiated by the lower Federal Courts as "irrelevant" and have been ignored entirely by the highest court in the land.

The trial court Judge, in his charge to the jury stated:

> "I might add at this point one further instruction, and that is that as a matter of law, I charge you that none of the treaties referred to in the evidence in this case, namely, the Treaty of London, referred to as the Nuremberg Trial; the Treaty of Paris referred to as the Kellogg-Briand Pact; the United Nations Charter; the Geneva Agreement of 1954, or the Hague Convention, interfere in any respect to this defendant fulfilling his duty under this order." (R. 1035, 1036 and Appendix to Appeal Brief, p. 26a)

Contrast this with Article VI of the Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby."

For the government and the court, the defendant's violation of one law was a crime; for the defendant, his decision to violate the draft law was a method of avoiding crime. How could the defendant's respect for the Nuremberg Law be considered irrelevant when it constituted his rejection of crime?

After consistently arguing against defendant's use of Nuremberg Law, the government cites Nuremberg Law itself, but it does so to deny individual responsibility and guilt, the very essence of the Nuremberg Charter.

> "Finally, the treaties relied on by petitioner (footnote enumeration from Pet. App. D) do not effect the constitutional power of the United States to compel petitioner to serve in the armed forces in any conflict in which this country is engaged. Nothing in the Charter of the International Military Tribunal (the Nuremberg Charter), on which petitioner chiefly relies (Pet. 14-15), or in any body of international decisional law suggests that individual soldiers are entitled to refuse to serve in wars with which they *disagree.*" (Emphasis added) *Mitchell* v. *U. S.* Brief for the U. S. in Opposition, pages 3-4.

This erroneous contention seeks to dilute petitioner's awareness of his possible participation in crime and treat is as mere "disagreement" with some particular war.[3]

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[3] Even the Department of the Army of the United States recognizes the crimes defined by Nuremberg Law. It lists under "Crimes Under International Law":

> "Any person, whether a member of the Armed Forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offences in connection with war . . . comprise: (a) Crimes against peace (b) Crimes against humanity, (c) war crimes." (Department of the Army, Field Manual dated 18 July 1956, Section 498)

(Footnote continued on following page)

Your petitioner sought to subject our conduct of the war in Vietnam to the scrutiny of a court of law, to prove by probative evidence to the satisfaction of a jury that his obedience to the order of his Draft Board would compel him to participate in crimes against International Laws for

> ". . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." (*United States of America* v. *Hermann Wilhelm Goering et al.*, 6 Fed. Rules Decisions 69, 110)

The effect of the Supreme Court's decision to deny certiorari is to close off legal channels for challenging the present actions of the U. S. in Vietnam. The government in its brief in opposition to the petition urged the Court to refuse to review because it would interfere with "the ability of the Chief Executive to conduct foreign affairs". It is for this reason particularly that the Court should review this case. The Courts have a responsibility to stop an illegal use of Presidential power—not to place the President above the law and beyond the judicial check of the Courts. In Germany, Hitler could only be stopped by war. Today the American Courts have the power and responsibility to stop what may be adjudged to be illegal use of Presidential power by giving a fair hearing to the peti-

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. The proponents as well as the opponents of United States aggression in Vietnam realize the relevance of Nuremberg Law. Conservative William F. Buckley, Jr., devoted one of his newspaper columns to defendant's attempt to raise Nuremberg Law during the first trial:

> ". . . I am glad I didn't have Judge Timbers' job. Oh, I could have scolded Mr. Mitchell along with the best of them. But I'd have had to cough and wheeze and clear my throat during that passage in my catechism at which I explained to Mr. Mitchell wherein the Nuremberg Doctrine was obviously not at his disposal." (The Atlanta Journal, Sept. 25, 1965).

tioner, who is willing in a court of law to test the actions of the government according to its own laws. By its silence the Court becomes an accomplice to the actions of the government and a mere instrument of national policy.

In *Bank of U. S.* v. *Owens et al.*, 2 Pet. 527, 7 L. Ed. 508, the Court said: —

> ". . . no Court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law?"

The Supreme Court will be challenged by the same issues in more and more cases in the future as Justice Douglas noted in his dissent: "We have here a recurring question in present day Selective Service cases." At some point the Court may be compelled to accept the challenge. A most recent example is in the instance of a "draft card burning" case. In *U. S.* v. *David Miller* (Court of Appeals for the Second Circuit), certiorari denied February 13, 1967, however subsequently the Court of Appeals for the First Circuit issued a contradictory interpretation regarding the constitutionality of the act in question—a direct conflict which will have to be resolved by the Supreme Court.

It seems judicially irresponsible to deprive your petitioner of his liberty for five years on issues which now have legal standing and to which the Court may address itself at some time in the future.

Gunther Anders, Austrian philosopher and author, most aptly expresses, in his *Declaration on the Mitchell Case*, the challenge presented to the Courts by petitioner:

> "Rarely has the highest court of a country had the chance to influence politics so decisively as in this trial. Just imagine that the Supreme Court would take

advantage of the Mitchell case in order to revive the spirit of Nuremberg and to reaffirm that very human being is entitled and not only entitled but even obliged, to openly disobey and to openly accuse his superiors when their orders contradict morality. Of course, such a reaffirmation of principles would not rebuild the cities destroyed by Americans, would not restore health of those maimed by Americans, would not reawaken those slaughtered by Americans. But it would encourage the world by proving that despite the fact that the wheels of destruction are grinding more and more relentlessly from day to day, there are still some just men left in the highest positions in America who are not afraid *to use justice as a clog in order to sabotage the machine of infamy.*"

CONCLUSION

Petitioner moves this Court for an order 1) vacating its denial of the Petition for a Writ of Certiorari entered March 20, 1967 and 2) granting the Petition.

Respectfully submitted,

DAVID HENRY MITCHELL, III
pro se.